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6 IN THE UNITED STATES DISTRICT COURT FOR THE
7 EASTERN DISTRICT OF CALIFORNIA

8
9 BLAKE WINGLE,) No. CV-F-05-160 REC/LJO
10)
11 Petitioner,) ORDER DENYING UNITED STATES'
12) MOTION FOR RULE 11 SANCTIONS
13) WITHOUT PREJUDICE
14)
15 vs.)
16)
17)
18 UNITED STATES OF AMERICA,)
19)
20 Respondent.)
21)
22)
23)
24)
25)
26)

17 On October 3, 2005, the court heard the United States'
18 motion for sanctions pursuant to Rule 11, Federal Rules of Civil
19 Procedure, against plaintiff, Blake Wingle.

20 Upon due consideration of the record and the arguments of
21 the parties, the court denies this motion without prejudice.

22 Blake Wingle, proceeding in pro per, has filed a an "Amended
23 Petition: For Protection of Inalienable Rights; Protection of
24 Civil/Statutory Rights; Appeal of Notice of Determination of IRS
25 Appeals Officers; For Setting Aside IRS Appeals Determination;
26 For New 26 U.S.C. §§ 6320 and 6330 Hearing; and For Remanding

1 Case Back to IRS Examination Division" (hereinafter referred to
2 as the Amended Petition). The Amended Petition alleges that this
3 court has jurisdiction "under the Constitution of the United
4 States, 28 U.S.C. § 1346, 26 U.S.C. § 6330; and 42 U.S.C.A. §
5 1983." The Amended Petition, which is voluminous, refers to the
6 "tax returns and IRS determinations ... for the tax years 1993,
7 1994, 1995, 1996 and 1997." The Amended Petition essentially
8 alleges that petitioner was entitled to an "IRS examination
9 hearing and appeals conference" before the IRS can proceed to
10 collection and that petitioner was never given examination
11 hearings or appeals conferences despite petitioner's requests for
12 them. The Amended Petition alleges:

13 2.04 The IRS proceeded to collection for each
14 subject year, without granting the Congress
15 mandated IRS Examination Hearings, and
16 therefore the IRS was without subject matter
17 jurisdiction and thereafter acting under
color of law, and all IRS collection
acts/actions were without legal effect and
void.

18 The Amended Petition alleges that petitioner was granted a
19 "Collection Due Process Hearing", that the "IRS Appeals Officers
20 were informed prior to the hearing and at the hearing that the
21 IRS has failed and refused to grant Plaintiff IRS examination
22 hearing, and in doing so have violated Plaintiff's inalienable
23 and statutory rights", that the "IRS Appeals Officers'
24 determination erroneously found that the IRS had complied with
25 all applicable IRS laws and procedures"; that "both IRS Appeals
26 Officers were NOT Knowledgeable of Congress enacted laws and

1 procedures or the facts in the IRS administrative record"; and
2 that the "IRS Appeals Officers evidenced ... bias and prejudice
3" The Amended Petition alleges that the "IRS Appeals
4 Determination(s) should be stuck [sic] down and new IRS Appeals
5 Hearing held with specific notice to determine AT THE HEARING
6 whether the IRS followed ALL applicable revenue laws and
7 procedures, and the appropriateness of collection in light of the
8 IRS' failure and refusal to grant pre-collection IRS examination
9 hearings." The Amended Petition prays for the following relief:

10 1. Set aside the IRS Appeals Determination;

11 2. Order the IRS to conduct a new IRS
12 Appeals hearing, or in the alternative order
13 the IRS Appeals Office to remand the IRS
determination and penalties for the years
1993, 1994, 1995, 1996, and 1997 to the IRS
14 Examination division for examination
hearings, so that Plaintiff can examine the
15 IRS' personnel's/Secretary's findings,
evidence and basis in law for IRS
determinations; and present Plaintiff's
16 findings, evidence and basis in law for
Plaintiff's filings and for the first time
17 fully set forth Plaintiff's position;

18 3. A finding that the IRS did NOT follow
19 applicable Congress mandated pre-collection
revenue law and applicable Congress and
Secretary mandated pre-collection procedure
20 for the years 1993, 1994, 1995, 1996 and
1997;

21 4. A finding that the IRS, with regard to
22 IRS determinations for the years 1993, 1994,
1995, 1996 and 1997, did consistently and
23 systematically violate Plaintiff's
inalienable rights, including, but not
24 limited to Plaintiff's rights of due process
of law, equal protection of the laws, and
25 endangered Plaintiff with taking Plaintiff's
property without just consideration. Partial
26 relief can be granted by remanding these

matters back to the IRS Examination division for Plaintiff's right to have a face to face meeting and all that such a meeting entails. Additional relief requested is that this Court issue an injunction/restraining order against the IRS prohibiting them from violating Plaintiff's inalienable rights.

5. A finding that the IRS with regard to IRS determinations for the years 1993, 1994, 1995, 1996 and 1997 did consistently and systematically violate Plaintiff's statutory and civil rights, including, but not limited to Plaintiff's rights of due process of law, equal protection of the laws, and endangered Plaintiff with taking Plaintiff's property without just consideration. Partial relief can be granted by remanding these matters back to the IRS Examination division for Plaintiff's right to have a face to face meeting and all that such a meeting entails. The IRS deprived Plaintiff of Plaintiff's federal protected rights while acting under color of law. This is a claim for relief can be granted [sic] and for which the United States Tax Court has no jurisdiction.

6. A finding that the IRS with regard to IRS determinations and penalties for the years 1993, 1994, 1995, 1996 and 1997 acted under color of law, and that all IRS determinations and acts without examination hearings were and are void, of no legal effect, and unenforceable.

The United States, which has not yet filed an Answer to the Amended Petition, has filed a motion for sanctions against petitioner pursuant to Rule 11, Federal Rules of Civil Procedure. The United States contends that sanctions under Rule 11 are warranted because petitioner "has advanced frivolous arguments challenging the constitutionality of federal tax law and has submitted papers for an improper purpose, to harass and vex the Government and its officials."

1 In so asserting, the United States contends that the instant
2 action "is almost identical" to a previous action filed by
3 petitioner with this court, Wingle v. Internal Revenue Service,
4 et al., No. CV-F-03-6122 AWI/LJO. The file in petitioner's
5 action before Judge Ishii has been sent to the Ninth Circuit in
6 connection with petitioner's appeal. Therefore, the court does
7 not have access to a copy of the Complaint filed by petitioner in
8 Judge Ishii's case. However, by Order filed on August 30, 2004,
9 Judge Ishii that the Complaint in his case was a "civil rights
10 action for injunctive relief stemming from a taxpayer's
11 discontent about procedures followed by the ... IRS ... to
12 collect tax penalties" and that the Complaint alleged that
13 defendants "denied plaintiff ... his right to a pre-collection
14 hearing." Judge Ishii further ruled in pertinent part:

15 The complaint alleges that the IRS imposed a
16 tax penalty on Plaintiff pursuant to 26
17 U.S.C. § 6702 for filing a frivolous income
18 tax return. Plaintiff alleges he is entitled
19 to an examination hearing, before the IRS
20 institutes collection proceedings. Plaintiff
21 alleges he has repeatedly and timely sought a
22 26 U.S.C. § 6703 penalty hearing from the
23 IRS, for the IRS to explain why the § 6702
24 tax penalty was imposed. Plaintiff alleges
he is entitled to an opportunity to explain,
prior to collection proceedings, why the
penalty was imposed in error. The IRS has
refused to hold an examination hearing and
has sent notices of intent to levy. The
complaint alleges that the IRS has not
followed pre-collection laws or procedures,
including pre-collection hearings. The
complaint also alleges that Plaintiff has
exhausted all of his administrative remedies.

25 ...
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1 In tax cases, the United States waives
2 sovereign immunity only when a claimant has
3 exhausted IRS remedies. Ordinarily, there is
4 no jurisdiction in district courts over suits
5 for refund or penalty amounts paid until
 taxpayer has paid the full amount of the
 contested penalty assessment and has filed
 claim for refund which IRS has either
 rejected or not acted upon in six months

6 In a tax case such as Plaintiff's, a claimant
7 must pay 15 percent of the § 6702 penalty and
8 file a claim for refund before bringing a
9 case in district court ... There is no
10 subject matter jurisdiction in the district
11 court under § 6703(c)(2) unless the taxpayer
12 follows the administrative remedies under §
 6703(c)(1) providing for payment of a portion
 of the penalty and filing of a claim for
 refund within 30 days of notification of
 assessment of the penalty ... No pre-
 assessment judicial procedures are available
 to challenge the § 6702 penalty

13 ...

14 Plaintiff has the burden of showing the
15 requisite waiver of sovereign immunity for
16 his suit ... Defendants argue that Plaintiff
17 fails to state a claim because he has not
18 paid the penalties owed under Section 6702
19 and exhausted his administrative remedies at
20 the IRS. Plaintiff alleges in his complaint
21 that he has exhausted administrative
22 remedies; however, Plaintiff does not allege
23 that he paid 15 percent of the amount of the
24 penalty assessed by the IRS and filed a claim
25 for refund, pursuant to 26 U.S.C. § 6703.
26 Therefore, Plaintiff has not shown that he
 has exhausted administrative remedies as to
 this claim against the United States, and
 sovereign immunity is not waived.
 Jurisdiction in this court is lacking.

23 Plaintiff asserts that notwithstanding the
24 court's lack of subject matter jurisdiction,
25 the court has jurisdiction under 28 U.S.C. §
26 1346. Section 1346(a)(1) gives the district
 courts jurisdiction over civil actions for
 the recovery of 'any internal-revenue tax
 alleged to have been erroneously or illegally

1 assessed or collected, or any penalty claimed
2 to have been collected without authority ...'
3 In 1960, the Supreme Court held that the
4 phrase 'any internal-revenue tax' can be
5 construed to refer to payment of the entire
6 amount of the assessment, and a federal
7 district court has no jurisdiction under
8 Section 1346(a)(1) of a suit for refund which
9 did not discharge the entire amount of his
10 assessment ... A taxpayer threatened with an
11 illegal tax must pay the tax and then seek
12 recourse through 26 U.S.C. § 7422, that is,
13 he must file a refund claim followed by a
14 federal lawsuit if necessary ... Plaintiff
15 does not allege that he paid the penalty
16 assessment or sought recourse through 26
17 U.S.C. § 7422 before filing the complaint in
18 district court. Plaintiff has not alleged
19 that he paid the purported tax debt and filed
20 a claim for refund before bringing his
21 federal lawsuit. Therefore, the court holds
22 that the district court does not have
23 jurisdiction under 28 U.S.C. § 1346 to enjoin
24 tax collection in Plaintiff's case.

13 ...
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15 Plaintiff contends that his constitutional
16 rights to due process and equal protection
17 have been violated because he has been denied
18 a hearing by the IRS. Defendants argue that
19 Plaintiff fails to state a claim because he
20 does not have constitutional rights to an
21 administrative hearing prior to assessment of
22 penalties under 26 U.S.C. § 6702. Federal
23 cases have rejected due process challenges to
24 the provisions of §§ 6702 and 6703 based on
the contention that there was no requirement
for a hearing before assessment of the
penalty ... The courts also rejected due
process challenges to the provisions based on
the contention that the provisions required
payment of 15 percent of the penalty before
administrative review and a judicial hearing
... Therefore, the court finds that Plaintiff
does not have constitutional rights to a pre-
collection administrative hearing.

25 The United States contends that the Amended Petition filed
26 in the action before this court, "although nonsensical and

1 unintelligible, appear[s] to seek relief based upon frivolous
2 claims regarding alleged constitutional violations involving
3 federal tax collection."

4 The court denies this motion for Rule 11 sanctions to the
5 extent that the United States contends that the instant action is
6 identical to petitioner's action before Judge Ishii. It is
7 apparent that the action before Judge Ishii was a challenge to a
8 penalty imposed upon petitioner for a single taxable year, which
9 challenge was based on an Internal Revenue Code section not
10 involved in the Amended Petition filed with this court. In
11 addition, the Amended Petition refers to more than one taxable
12 year and contests the adequacy of the hearing accorded petitioner
13 under 26 U.S.C. § 6330, a challenge not involved in Judge Ishii's
14 action.

15 Apparently recognizing the differences between the action
16 dismissed by Judge Ishii and the allegations of the Amended
17 Petition before this court, the United States argues that Rule 11
18 sanctions should be imposed on petitioner because of his failure
19 to comply with Magistrate Judge O'Neill's Order directing Wingle
20 to file an Amended Petition.

21 The record in the instant action demonstrates that
22 Magistrate Judge O'Neill initially recommended sua sponte that
23 this action be dismissed without leave to amend. However, after
24 reviewing petitioner's objections to the recommendation,
25 Magistrate Judge O'Neill vacated the recommendation and issued an
26 Order directing petitioner to file an Amended Petition, stating

1 in pertinent part:

2 Based on plaintiff's papers filed May 5,
3 2005, this Court construes plaintiff's
4 complaint to allege errors of an appeals
5 officer's determination following a December
6 14, 2004 due process hearing. The
7 complaint's allegations regarding the appeals
8 officer fail to state a claim. The complaint
9 fails to allege Section 6330(c) discrepancies
10 to permit this Court to proceed with review.
11 The complaint fails to even hint at the
12 appeals officer's determination. The
13 complaint makes sweeping comments without
14 supporting facts or substance. The complaint
15 fails to state facts that this Court, rather
16 than the United States Tax Court, has
17 jurisdiction to satisfy F.R.Civ.P 8(a)(1).
18 The complaint does not adequately identify
19 grounds for relief to satisfy F.R.Civ.P
20 8(a)(2). The complaint fails to articulate
21 particular relief sought by plaintiff. The
22 pleading deficiencies prevent this Court from
23 proceeding on plaintiff's complaint.
24
25 ...

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27 Magistrate Judge O'Neill directed petitioner to file an amended
28 petition in compliance with his order and admonished petitioner
29 that "a failure to file an amended complaint in compliance with
30 this order will result in a recommendation to dismiss this action
31 for failure to obey a court order."

32
33 The United States contends that petitioner has not complied
34 with Magistrate Judge O'Neill's Order because the Amended
35 Petition

36
37 still makes 'sweeping comments without
38 supporting facts or substance' and neither
39 states facts where subject matter
40 jurisdiction can be ascertained nor states
41 claims upon which relief can be granted ...
42 In viewing the 150+ page Amended Complaint in
43 the most favorable light possible, this Court
44 may have subject matter jurisdiction over

1 frivolous filing penalties (but not income
2 tax penalties) that may have been assessed
3 against Mr. Wingle: Mr. Wingle filed his
4 complaint on February 4, 2005, within 30 days
5 of the Notice. See 26 U.S.C. § 6330(d)(1)
... However, Mr. Wingle fails to even hint of
any claim regarding frivolous filing
penalties in violation of Rule 8(a)(2) of the
Federal Rules of Civil Procedure.

6 Petitioner is proceeding in pro per. The United States
7 concedes that this court has subject matter jurisdiction over
8 petitioner's claims concerning the due process hearing under
9 Section 6630 accorded to him, at least to the extent the Amended
10 Petition complains of the frivolous filing penalties imposed on
11 petitioner. To the extent that the United States is arguing that
12 Rule 11 sanctions should be granted because the Amended Petition
13 does not state a claim upon which relief can be granted, the
14 United States has not moved to dismiss the Amended Complaint
15 pursuant to Rule 12(b)(6). Although imposition of Rule 11
16 sanctions may be appropriate at some later date, the court
17 concludes that a request for Rule 11 sanctions on the ground that
18 the Amended Petition does not state a claim upon which relief can
19 be granted is premature.

20 ACCORDINGLY:

21 1. The United States' motion for sanctions pursuant to Rule
22 11, Federal Rules of Civil Procedure, is denied without
prejudice. IT IS SO ORDERED.

23 **Dated: October 13, 2005**
668554

/s/ Robert E. Coyle
UNITED STATES DISTRICT JUDGE